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SIPDIS

DEPARTMENT FOR AF/E

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TAGS: [KDEM](#) [PGOV](#) [PREL](#) [KE](#)

SUBJECT: THE CONSTITUTIONAL REVIEW PROCESS AND THE REFORM
AGENDA

Classified By: Ambassador Michael E. Ranneberger for reasons 1.4 (b) and (d)

¶1. (C) Summary. Meaningful constitutional review is vital to successful implementation of the reform agenda and to mitigate prospects for violence and instability in connection with the 2012 elections. While there is broad appreciation of this, President Kibaki, Prime Minister Odinga and their teams have not reached compromise on the structure of executive power in the new draft constitution. If they do not do so before the draft is tabled in Parliament (which may take place next week), the constitutional review process could well prove divisive and still-born. Kofi Annan is pressing both sides to reach a compromise, and will call Kibaki and Odinga if they fail to do so in the coming days. We have made clear our support for such a compromise. Key deliberations between the two sides are taking place this week, on the eve of Parliament's return after a two-month hiatus. We should consider weighing in with Kibaki and Odinga to support Annan's intervention, if necessary. End summary.

¶2. (C) As a result of the agreement to form the coalition government, a Committee of Experts was formed to make recommendations for review of the current constitution. The Committee is widely regarded as credible, though President Kibaki's advisors complain that ODM (pro-Odinga) voices outweigh PNU (pro-Kibaki) voices on the committee. The Committee has been soliciting input from civil society, political parties, and the public. Even before the Committee began its work, there was broad agreement that there were three contentious issues the committee would work to resolve: the structure of executive power, devolution of power to regional and local levels, and arrangements for the transition between the current constitution and the new constitution.

¶3. (C) The Committee is tasked with producing a draft new constitution for submission to the Parliament for consideration. Once Parliament has approved the draft, there will be a national referendum. President Kibaki and Prime Minister Odinga have consistently maintained that their goal is to hold a referendum by mid-2010 latest.

¶4. (C) Despite such optimistic rhetoric, the constitutional review process has been hampered by political machinations. It is generally recognized that the most difficult issue is the structure of executive power, i.e. will there be a strong President, a strong Prime Minister, or some hybrid approach. As the head of the Committee of Experts told me months ago, unless Kibaki and Odinga can agree in advance on the structure of executive power and then make that proposal to the Committee of Experts to incorporate into the draft, the entire process may be still-born. If Kibaki and Odinga do not reach agreement in advance of the tabling of the constitution draft in Parliament, the debate is likely to be divisive and polarizing, clouding prospects for compromise and increasing the likelihood of ethnic conflict around the public referendum.

¶5. (C) Kibaki and Odinga clearly understand this dynamic. It is hard, therefore, to explain their failure to work out a

compromise on the structure of executive power unless they lack the political will to do so, or have alternative gameplans. Kibaki,s team favors a strong executive; Odinga and his team claim to favor a hybrid system with a relatively strong PM. It is possible that the two sides may be miscalculating. Kibaki,s people may believe that failure to reach a compromise will doom prospects for a new constitution, which would be fine with them since they favor the current system with a strong executive. Odinga may believe that he has the votes in Parliament to force through approval of a hybrid system, and then win a divisive referendum.

¶6. (C) A divisive national referendum along the lines of the one held in 2005 would be worse than no revision of the constitution. A divisive referendum would raise tensions in a way that would damage prospects to hold a peaceful, credible election in 2012, and could be a trigger for significant ethnic violence. Given the reports of light arms flowing into the country, this is an eventuality that must be avoided at all costs.

¶7. (C) Understanding this, Kofi Annan has been pushing Kibaki and Odinga to reach a compromise. During his November visit, Annan urged them to do so, and obtained their agreement to form a committee to work out a compromise to be presented to Kibaki and Odinga. That committee is headed by Minister of Justice and Constitutional Affairs Mutula Kilonzo for Kibaki,s side, and by Minister of Lands Orengo (a constitutional lawyer) for Odinga,s side. The committee has met only a couple of times and each side blames the other for lack of progress. We have also been encouraging the two sides to work out a compromise.

¶8. (C) The Committee of Experts is already behind the

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legally-mandated scheduled to send the new draft constitution to Parliament. The Chairman has delayed doing so to buy time for the two sides to work out agreement on the structure of executive power. Under the growing time pressure, and as a result of Kofi Annan,s pressure and ours, it appears that the committee finally made some progress last week. The committee will meet again November 10. Kibaki and Odinga have also called a Cabinet &bonding retreat8 for Nov. 13-14, which may be aimed at forging consensus on the draft constitution. Kibaki and Odinga are under growing pressure from all over on the reform agenda, and delivering a consensus constitution draft would be a major deliverable. Meanwhile, the head of the Committee of Experts told me that he will hold off until next week to present the draft to Parliament, in order to give more time for the two sides to work out a deal.

¶9. (C) Annan told me that he is talking with both sides to urge them to reach a deal, and he will call Kibaki and Odinga this week if the committee does not make progress. Annan will keep me apprised of his contacts. We may also want to consider weighing in at high levels if the two sides do not move forward.

¶10. (C) While the reform agenda covers a wide array of vital issues, constitutional review is in many respects the central issue. A new constitution reached through consensus by the coalition partners and consultation with stakeholders is crucial to provide a framework to manage political and ethnic competition so that each election is not seen as a winner-take-all scenario. Without that new framework, violence and instability will be almost inevitable in connection with the 2012 elections. A new constitution would help mitigate in favor of a more peaceful political contest. Other reforms, with respect to the police and judiciary, are key to complement constitutional review and to give all groups more assurance that their interests will be safeguarded, but if constitutional review fails, those other reforms will not be sufficient to change the dynamics for ¶2012.

¶11. (C) In order to support the constitutional review process, USAID has provided funding to the International Development Law Organization to support the Committee of Experts. We are also working with the Interim Independent

Electoral Commission, which is mandated to undertake the referendum, but has not yet begun the critical step of voter registration.

RANNEBERGER